

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON 25

B-123382

April 21, 1955

Dear Mr. Secretary:

Reference is made to letter of March 22, 1955, with enclosure (Military Pay and Allowance Committee Action No. 113), from the Assistant Secretary of Defense (Comptroller), requesting decision whether we will follow the opinion of Court of Claims in the case of Tanner v. United States, C. Cls. No. 543-53, and two related cases, decided November 2, 1954, in all cases involving Reserve officers of the uniformed services, including officers of the National Guard, retired, or granted retirement pay, under any statute authorizing retirement, or the granting of retirement pay, for physical disability, age, or length of service.

It was held in the Tanner case that by section 1(b) of the act of July 1, 1947, 61 Stat. 239, 10 U.S.C. 371b, the express prohibition against the receipt of dual compensation contained in section 212 of the Economy Act of June 30, 1932, as amended, 5 U.S.C. 59a, was nullified as to members of the Officers' Reserve Corps of the Army granted retired pay under the provisions of Title III of the act of June 29, 1948, 62 Stat. 1087, and that such members could receive both retired pay and the compensation of a Federal civilian position, regardless of the combined rate from both sources.

While the opinion was rendered in the Tanner case on November 2, 1954, entry of judgment was suspended pending determination of the amounts due Mr. Tanner and the plaintiffs in the other two cases covered by the opinion. Our computations of the amounts due should be received by the court in the immediate future. When the judgment is entered the Attorney General may wish to petition the Supreme Court of the United States for a writ of certiorari. In these circumstances the Tanner case constitutes no basis now for action by us in any situation. Consequently, we may not at this time determine the matter.

Your request, however, will be held in abeyance until the Tanner case has been finally litigated, at which time we will advise you further.

Sincerely yours,

/s/ Joseph Campbell
Comptroller General
of the United States

The Honorable

The Secretary of Defense

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DEPARTMENT OF DEFENSE

MILITARY PAY AND ALLOWANCE COMMITTEE

COMMITTEE ACTION NO. 113

QUESTIONS:

1. Will the finding in the United States Court of Claims case, decided 2 November 1954, No. 543-53; No. 38-54; and No. 39-54 be followed by the Comptroller General of the United States with respect to all reserve officers of the armed services, including officers of the National Guard, who were either retired with pay or later granted pay for (1) disability under the provisions of any law, and (2) age and length of service under Titles II or III of the Act of 29 June 1948, 62 Stat. 1087, 10 USC 1036?

2. To what extent, if at all, the decision of the United States Court of Claims in Tanner et al v. United States, decided November 2, 1954, may be followed by the Navy. More particularly, decision is requested as to whether in the case of retired Reserve officers in the categories specified, the decision in that case provides exemption from the restrictions contained in section 212 of the Act of June 30, 1932, as amended (5 USC 59a) as further amended by Public Law 300, 83rd Congress, approved February 20, 1954, the so-called Dual Compensation statute, against the concurrent receipt by retired officers of retired pay from the Navy and pay from a Federal civil position:

a. Commissioned reserve officers retired for years of active service (20 or 30 years) as provided by section 310 of the Naval Reserve Act of 1938 (52 Stat. 1183), and receiving retired pay based on such commissioned rank.

b. Commissioned reserve officers of the Navy retired prior to January 1, 1953 either for age and years of service under Title III of the Act of June 29, 1948 (62 Stat. 1087), as amended, or under the provisions of the Act of February 21, 1946, (60 Stat. 26), as amended, or retired for years of service under any other applicable provisions of law, or retired for physical disability, and receiving retired pay based on such commissioned rank.

c. Members retired from the Fleet Reserve prior to January 1, 1953 upon completion of 30 years of service pursuant to section 204 of the Naval Reserve Act of 1938 (52 Stat. 1179) and subsequently advanced on the Retired list to commissioned rank or commissioned warrant rank with retired pay based on commissioned rank.

d. Members retired from the Fleet Reserve on or after January 1, 1953 after completion of 30 years of service pursuant to section 204 of the Naval Reserve Act of 1938, supra, and thereupon advanced to commissioned or commissioned warrant grade on the Retired List, with retired pay based on commissioned rank.

e. Commissioned Reserve officers retired on or after January 1, 1953 either for physical disability or for years of service under Title III of the Act of June 29, 1948, as amended, supra, or the Act of February 21, 1946, as amended, supra, or section 413 of the Armed Forces Reserve Act of 1952, approved July 9, 1952 (66 Stat. 499), or under other applicable provisions of law, with retired pay based on such commissioned rank.

f. Former members of the Naval Reserve granted retired pay, under Title III of the Act of June 29, 1948, as amended, supra, such pay being based on the pay of commissioned rank who, although meeting the requirements of that Title, had ceased to be members of the Naval Reserve prior to being granted retired pay.

3. Assuming that the decision of the Court of Claims is applicable in any of the above instances, to what extent, if any, may retroactive effect be given to that decision with respect to entitlement to receive both military retired pay and pay from a Federal civil position?

DISCUSSION:

In regard to the first question, speculation exists as to the scope which the Comptroller General will give the court decision. He might conclude that the decision pertains only to the particular officers named in the suit; or that it also applies to all reserve officers retired under the provisions of Title II or Title III of Public Law 810, 80th Congress, 62 Stat. 1087; or that it has application to all reserve officers regardless of the type of retirement.

Falling in the last named category would be the case of a member who was retired for disability as a Captain, United States Air Force, effective 8 October 1944. The disability on which his retirement was based was not incurred in combat with an enemy of the United States, nor was it the result of the explosion of an instrumentality of war in line of duty. The Comptroller General in B-112074, 2 February 1953, held that concurrent receipt of disability retirement pay successively from the Veterans Administration, and the Departments of the Army and the Air Force, and compensation as a United States Senator was unauthorized and required collection from the Senator of the retirement pay received under such circumstances.

The Comptroller General in the decision just cited made no mention of the Act of 1 July 1947, 61 Stat. 238, 10 USC 371 and 371 (b), which provides as follows:

"All officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps or of the Enlisted Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to active duty for training, or active duty, or to duty with troops or at field exercises, or for

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